

NO. 50035-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ARTURO RIOS,

Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Mr. Rios was found guilty after trial of assault in the second degree. At sentencing, the trial court required he register as a felony firearm offender under RCW 9.41.330 as a result of his conviction. However, the trial court's conclusion that Mr. Rios was convicted of a felony firearm offense was erroneous.

RCW 9.41.010 defines a felony firearm offense as, *inter alia*, "[a]ny felony offense if the offender was armed with a firearm in the commission of the offense." RCW 9.41.010(9)(e). In this case, the jury was presented with evidence that Mr. Rios assaulted another person with a deadly weapon by using either a firearm or a knife. The jury returned a general verdict. Therefore, nothing in the record established the jury found Mr. Rios used a firearm to commit the crime of assault, as opposed to the knife also alleged by the State. Because the jury's verdict did not specify a firearm was used in the commission of the offense, the trial court erred in finding Mr. Rios committed a felony firearm offense and the duty to register as a felony firearm offender should not have been imposed. Accordingly, it is respectfully requested this Court strike the duty to register as a felony firearm offender under RCW 9.41.330.

II. ASSIGNMENT OF ERROR

At sentencing, the trial court abused its discretion when it imposed upon Mr. Rios the duty to register as a firearm felony offender under RCW 9.41.330.

III. ISSUE PRESENTED

RCW 9.41.330 requires a trial court to consider imposition of the duty to comply with the registration requirements of RCW 9.41.333 when a person has been convicted of a felony firearm offense. In this case, the jury was presented with evidence that Mr. Rios committed the crime of assault in the second degree by using either a firearm or a knife as a deadly weapon. A general verdict was returned by the jury finding Mr. Rios guilty of the crime. As such, there is nothing in the record to indicate the jury found Mr. Rios used a firearm, as opposed to a knife, to commit his crime.

Does the jury's general verdict support the trial court's finding that Mr. Rios was convicted of a felony firearm offense? Did the trial court abuse its discretion when it imposed upon Mr. Rios the duty to register as a felony firearm offender under RCW 9.41.330?

IV. STATEMENT OF THE CASE

Mr. Rios was charged in Grays Harbor County Superior Court No. 17-1-00006-2 with one count of assault in the second degree in violation of

RCW 9A.36.021(1) for conduct alleged to have occurred on December 30, 2016. CP 1. The Information alleged:

That the said Defendant, Arturo Gomez Rios, in Grays Harbor County, Washington, on or about December 30, 2016, did intentionally assault Jorge Topete with a deadly weapon to wit: a handgun and/or a knife.

Id. Mr. Rios was found guilty of this offense after a trial by a jury on February 23, 2017. CP 49. The Notice of Appeal was filed on March 6, 2017 along with an order finding Mr. Rios indigent. CP 70-71.

A. Trial Proceedings

The State called Cody Martin as its first witness at trial. RP I 5-6¹. Mr. Martin testified he saw Mr. Rios on December 30, 2016 at the “teriyaki place”. RP I 7. He had not previously met Mr. Rios. *Id.*

Mr. Martin ordered food to go. *Id.* While waiting for his order, Mr. Rios “came over to me with his plate of food, slammed it in front of me, and started verbally assaulting me.” *Id.* Prior to that point, Mr. Martin had not spoken with Mr. Rios. “No. I just came in, ordered my food, and sat down.” *Id.* Mr. Martin testified he did not know why Mr. Rios was upset. *Id.* He was unable to understand much of what Mr. Rios said to him during the interaction. “It was in Spanish. But words I did catch were profanity

¹ RP I references the transcript of the trial proceedings held on February 22-23, 2017. RP II references the transcript of the 3.5 hearing held on February 22, 2017 and the sentencing hearing held on March 6, 2017.

and a lot of it.” RP I 8. Mr. Martin did not respond to Mr. Rios’s behavior.

Id.

Since I didn’t reach, didn’t do anything, he walked away. He went over to the counter and started to pay for his food and he was arguing, from what I – sounded like to me arguing with the owner or the guy behind the counter. Gave him his change, he went back to me, threw his change at me, said some more profanity at me and then left.

RP I 8-9. Mr. Martin did not see Mr. Rios again that day. RP I 10. “As soon as I got my food I just left.” *Id.*

The State then called Jorge Topete, the owner of the teriyaki restaurant. RP I 11. He identified Mr. Rios as a customer who came to his restaurant on December 30, 2016. RP I 12. Mr. Topete was in the kitchen when his wife came to tell him two men were fighting in the restaurant. *Id.* “[S]o I came out. I don’t see his face, so he walk out.” *Id.* Mr. Topete followed Mr. Rios outside. *Id.* “So I told him what’s going on. He didn’t say nothing. He just – he’s like, I come back and kill you.” RP I 13. Mr. Topete made a gesture with his fingers while testifying and was asked by the State to describe the gesture for the record. *Id.* “Just like . . . a gun. I don’t know.” *Id.*

Mr. Topete called the police after Mr. Rios left. RP I 15. “[S]o the officer, he told me they go talk to the guy. He told me in case if he come

back, just call us.” *Id.* According to Mr. Topete, Mr. Rios came back after the police left. *Id.*

He came. He’s like, oh, I’m looking for my phone. I said, you don’t forget your phone here. Can you please leave or I’m going . . . to call back the police. He’s like, the police don’t do nothing to me. I said, okay. So he take the gun out and he point at me. He’s like, I’m going to kill you.

RP I 16.

Mr. Topete testified he knows guns and has had a gun pointed at him before this incident. *Id.* When asked what type of gun Mr. Rios used, Mr. Topete responded, “It’s like a 9 mm, so .45.” RP I 16-17. He agreed it was the type of gun a police officer carries. RP I 17. Mr. Topete testified that he was scared and concerned he would be shot. *Id.* He called the police again and Mr. Rios left. *Id.*

Guadalupe Bolanos testified she was eating at the Teriyaki restaurant with her boyfriend on December 30, 2016. RP I 30-31. She saw Mr. Rios throw his food at another customer and leave. RP I 30-33. She testified Mr. Rios came back ten to fifteen minutes later and argued with the owner of the restaurant. RP I 34.

He came back asking for his cell phone and the waitress told him there’s no phone there. She called the owner. They exchanged words. And then he said the police already went to my work place, I’m not scared of them, what are they going to do to me.

Id. According to Ms. Bolanos, Mr. Rios then said “I’ll shoot you” to the owner and took out a gun. RP I 35. He pointed the gun up in the air. RP I 40.

Ms. Bolanos was five feet away from Mr. Rios during the incident. RP I 35. She testified that she is not familiar with guns and could not describe the gun. *Id.* “It all happened so fast, I don’t remember.” *Id.* She denied it could have been a knife that she saw. *Id.*

Ms. Bolanos’s boyfriend, Edwin Torres, testified he saw Mr. Rios throw his food at another customer and leave. RP I 49. Mr. Rios then came back and argued with the owner of the restaurant. *Id.* Mr. Torres didn’t know how long they argued but it was for a very short period of time. RP I 53. “[J]ust as he was about to leave he pulled out a pistol and aimed it up.” RP I 49. Mr. Torres testified he did not know a lot about guns. RP I 50. He believed it was “[s]ome type of 9mm.” *Id.* The handle looked square. RP I 54.

The State called several law enforcement officers to testify. Officer Pearsall testified Mr. Rios was taken into custody and searched. RP I 60-61. No gun was found on his person. RP I 61. A knife was found in Mr. Rios’s front left pocket. *Id.* Officers also found a bullet. “I flipped his right pocket inside out and either by him moving or somehow a bullet fell to the

ground from that pocket.” *Id.* The knife was described as black in color with a rectangular, square and blackish handle. RP I 108-09.

Officer Pearsall asked Mr. Rios about the location of the firearm. RP I 67. “He said – he held up a knife, said he didn’t have a gun.” *Id.* Officer Monte Glaser also interviewed Mr. Rios. RP I 101-102. “I asked him. . . if the weapon was loaded or unloaded and he said it was initially unloaded and then he said he . . . didn’t remember.” RP I 102. Officer Glaser testified Mr. Rios never admitted to having a gun. RP I 103. “He did not. I also asked him about the bullet . . . that fell out of this [sic] pocket. And he said . . . to the effect that it’s not illegal to carry bullets.” *Id.* Officers searched the area for a firearm but one was never located. RP I 67. The search for the firearm went on for hours. RP I 68.

During closing arguments, the State argued the knife could constitute the deadly weapon for the charge against Mr. Rios.

[Defense] may point out to you, as he brought out from the witnesses, that the knife is kind of squared off, too, right. He may suggest to you that it was the knife, not the gun. All right. And so I . . . just need to address that briefly. Look at your definition of a deadly weapon because, remember, the charge is assault in the second degree, which means an assault with a deadly weapon, not a gun. A gun is a deadly weapon, but it’s not the only one. Okay. A gun is always a deadly weapon. Other things can be deadly weapons.

RP I 143-44. During rebuttal, the State argued, “I will agree with Mr. Ehrhardt it doesn’t matter if it’s a gun or a knife, all right, because either one is a deadly weapon.” RP I 156.

The jury was instructed that in order to find Mr. Rios guilty of assault in the second degree, they must find the State proved beyond a reasonable doubt that Mr. Rios assaulted Jorge Topete with a deadly weapon. CP 33; RP I 126-27. A deadly weapon was defined for the jury in Instruction No. 7. CP 33-34; RP I 127. After deliberating, the jury returned a verdict finding Mr. Rios guilty of assault in the second degree. CP 49. The jury’s verdict did not specify whether the deadly weapon used by Mr. Rios was a firearm or knife. *Id.*

B. Sentencing Hearing

A sentencing hearing was held on March 6, 2017. CP 56-67. As part of its recommendation, the State requested the trial court order Mr. Rios to register as a felony firearm offender under RCW 9A.02.030. RP II 13. In response, the defense argued, “They may have found Mr. Gomez Rios guilty, but they never did make any finding about whether it was a knife or a firearm[.]” RP II 14. The trial court then found Mr. Rios was convicted of a felony firearm offense and ordered him to register. RP II 14-15.

V. ARGUMENT AND AUTHORITIES

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING MR. RIOS WAS CONVICTED OF A FELONY FIREARM OFFENSE UNDER RCW 9.41.330.

Discretionary decisions are reviewed for abuse of discretion. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011). A court abuses its discretion when it bases its decision on untenable grounds or acts for an untenable reason. *State v. Runquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)); *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Abuse of discretion will be found where a court applies an incorrect legal standard, makes factual findings unsupported by the record, makes a decision outside the range of acceptable choices given the facts and the legal standard, or bases its decision on an erroneous view of the law. *Runquist*, 79 Wn. App. at 793. Here, the trial court abused its discretion in finding Mr. Rios was convicted a felony firearm offense because such a factual finding was unsupported by the record.

Felony Firearm Offender Registration can be imposed if a person has been convicted a felony firearm offense. For most felony firearm offenses, it is within the court's discretion to impose such a requirement.

[W]henever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose

a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.

RCW 9.41.330(1). A felony firearm offense is defined, *inter alia*, as “[a]ny felony offense if the offender was armed with a firearm in the commission of the offense.” RCW 9.41.010(9)(e).

In this case, Mr. Rios was convicted of assault in the second degree. In so convicting, the jury found he committed the crime of assault by using a deadly weapon. However, the jury’s general verdict did not specify whether it found Mr. Rios used a firearm as his deadly weapon. During trial, the State alleged Mr. Rios used a firearm or, in the alternative, a knife as a deadly weapon. There was evidence to support both alternatives.

Though witnesses testified they saw Mr. Rios with a firearm, no firearm was ever recovered. During trial, there was testimony to support the defense argument that the knife found on Mr. Rios could have been mistaken for a firearm. The knife was described as black with a squarish handle. The jury also heard Mr. Rios’s statements to law enforcement that he used a knife, not a firearm during the incident. Based on the record, it cannot be assumed the jury found Mr. Rios used a firearm in the commission of his crime and rejected the evidence a knife may have been used instead.

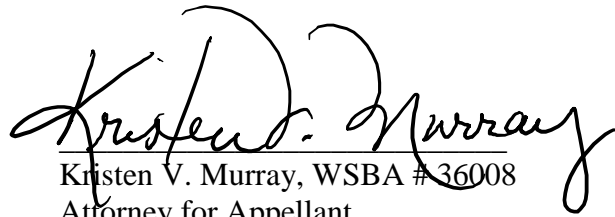
“It is well settled that in an alternative means case a criminal defendant does not have the right to a unanimous jury determination as to the *particular* means used to carry out the crime.” *State v. Smith*, 159 Wn.2d 778, 793, 154 P.3d 873 (2007). “When there is sufficient evidence to support each alternative means, Washington defendants do not enjoy a right to express unanimity.” *State v. Woodlyn*, 188 Wn.2d 157, 164, 392, P.3d 1062, 1066 (2017).

Here, the jury’s verdict did not specify whether it found Mr. Rios used a firearm as a deadly weapon. It could have rejected the State’s assertion that a firearm was used and, instead, found Mr. Rios used a knife. Accordingly, the record lacked the factually findings necessary for the trial court to conclude Mr. Rios was found guilty of a felony firearm offense. The trial court abused its discretion when it imposed upon Mr. Rios the duty to register as a felony firearm offender under RCW 9.41.330. Therefore, it is respectfully requested this Court strike the requirement that Mr. Rios register as a felony firearm offender under RCW 9.41.330.

VI. CONCLUSION

It is respectfully requested that this Court strike the requirement that Mr. Rios register as a felony firearm offender under RCW 9.41.330.

Respectfully submitted this 21st day of September, 2017.



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DECLARATION OF SERVICE

I hereby declare that on September 21, 2017, I filed the Appellant's Brief via Electronic Filing for the Court of Appeals for Division II and delivered via E-mail the same to:

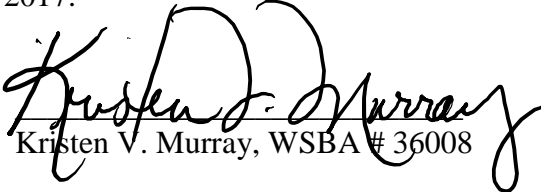
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated September 21, 2017.


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